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Supreme Court, U.S.
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No. 93-423

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

STAVROS KATSIS, Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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Respondent's Argument, that the Questions Presented Will Soon Be Resolved by Rulemaking, is Unsupported in the Record and is Incorrect as a Matter of Law

Respondent's Brief, conceding as it must that the Circuit Courts of Appeal are in conflict on this issue, and that the issue is important, seeks to avoid this Court's review solely by asserting that "regulations are expected to be issued in the near future [which] will specifically address the question presented by the certiorari petition in this case." Respondent's Brief at 7.[1] Respondent effectively acknowledges that the case is "certworthy, but" a rulemaking is promised to resolve the issue. This assertion has neither record support and nor authorization under the statute cited, Section 545(d) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5066.

The Record

Respondent asserts that regulations to address the question presented here will be issued "soon". However, nothing in the record suggests that this is the case. Respondent has not cited

1. The Petition for Certiorari presented three questions; however, Respondent's Brief addresses only the first, i.e. conflict among the Circuits on an issue of importance. This Reply Brief is therefore limited to discussion of that question; however, Petitioner submits that the other two questions are independently deserving of this Court's consideration.

any Notice or Proposed Rulemaking in the Federal Register, has not appended any affidavit or letter, has not submitted any support for its assertion that regulations dispositive of the issue are wending their way through the Department. To support its assertion that such regulations are "expected", Respondent cites nothing other than the authority given to the Attorney General over three years ago, in Section 545(d) of the Immigration Act of 1990, supra. The text of that statute (omitted from Respondent's Brief) demonstrates the opposite conclusion.

The Statute

Section 545(d), which was effective as of November 29, 1990, reads:

> REGULATIONS ON MOTIONS TO REOPEN AND TO RECONSIDER AND ON ADMINISTRATIVE APPEALS.--Within 6 months after the date of the enactment of this Act, the Attorney General shall issue regulations with respect to--
> (1) the period of time in which motions to reopen and to reconsider may be offered in deportation proceedings, which regulations include a limitation on the number of such motions that may be filed and a maximum time period for the filing of such motions; and
> (2) the time period for the filing of administrative appeals in deportation proceedings and for the filing of appellate and reply briefs, which regulations include a limitation on the number of administrative appeals that may be made, a maximum time period for the filing of such motions and briefs, the items to be included in the notice of appeal, and the consolidation of motions to reopen or to reconsider with the appeal of the order of deportation.

This enactment does not authorize the promulgation of regulations dispositive of the issue presented here. Rather, the subject of §545(d) is limitations on the number of motions and the maximum

calendar time period in which motions may be filed. (Presently there is no time limit.) This was the issue raised in INS v. Abudu, 485 U.S. 94 (1988), cited in Respondent's Reply Brief at 4. Congress mandated the Attorney General to devise procedural regulations to prevent repetitive and/or dilatory motions -- procedural regulations which were to apply irrespective of the remedy sought. It did not contemplate or include authority to regulate substantive eligibility for relief under Section 1182(c), the issue raised by this Petition and on which the Circuits have divided.

Moreover, Congress gave the Attorney General six months in which to promulgate such regulations. As Respondent acknowledges, that mandate expired in the Spring of 1991. Respondent's Brief at note 8. Years have passed; the Attorney General has never asked for an enactment to extend this authority, which by its terms has expired.

Thus, the "expected" regulations would be neither relevant nor, at this late date, even authorized as the Respondent suggests.

The Split among the Circuits Cannot be Resolved by Regulation

Respondent's sole argument against certiorari is that the split among the Circuits need not be resolved by this Court, since the Attorney General can and will resolve the matter by regulation. This position is based on Respondent's assertion that "[e]ach of the courts of appeals that has rejected the government's position

has relied heavily on the notion that [the government's position] ... is inconsistent with the unqualified provision in 8 C.F.R. 3.2 authorizing motions to reopen." In fact the opinions in question held the government's position not only inconsistent with Section 3.2, but invalid on other, non-regulatory grounds as well.

Henry v. INS, Nos. 91-2252, 92-1476, and 92-2801 (7th Cir. October 15, 1993) rejected the government's assertion there, that its position was a reasonable barrier against dilatory, self-serving motions to reopen (the assertion which is the basis of Respondent's 545(d) argument). Specifically referring to the Third Circuit's opinion in the instant case, the Seventh Ciruit stated at pp. 20-21:

> We find Katsis problematic in several respects. First, it assumes that aliens always manufacture equities to support their applications for a discretionary waiver of deportation and that they have ample time to engage in such "manipulation" before a final administrative order of deportation is issued....We do not share the Third Circuit's view that all evidence weighing in favor of an alien has somehow been manufactured. Although some evidence relevant to the section 212(c) inquiry may be subject to manipulation ... Katsis fails to account for cases where circumstances change with no help from the alien.... We also cannot simply dismiss the evidence as probably immaterial, as Katsis suggests. That concern [regarding "manufactured" evidence] therefore does not justify a rule precluding all evidence of changed circumstances at the outset. (at 20-21) [2]

2. Although the Third Circuit was cynical about Petitioner's new evidence, the Board of Immigration Appeals was not, characterizing it as "new evidence that would serve to bolster his equities for a discretionary determination under Section 212(c) of the Act." Appendix C to the Petition at p. 27a (emphasis added).

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Goncalves v. INS, 6 F.3d 830 (1st Cir. 1993) rejected the Government's position "for the following three reasons, taken together." (Id. at 832, emphasis added). In addition to holding that the government's position was (1), inconsistent with 8 C.F.R. §3.2, the First Circuit held that it was (2) an unreasonable interpretation of the statute, not entitled to deference under the Chevron doctrine and (3) not a reasonable means of avoiding dilatory and abusive motions. Thus, Section 3.2 is by no means the sole issue.[3]

Petitioner requests that certiorari be granted, because the issues raised in this Petition cannot simply be resolved by rulemaking, even assuming that the statutory delegation of authority in Section 545(d) was still viable.

Alternatively, if the Court finds that Respondent's position has merit, the decision on this petition might be deferred until the promised regulations are promulgated and made available for this Court's consideration.

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3. Neither the second nor the third resons "defers" to the Board as did the Third Circuit in the instant case. Mere citation of Chevron is cannot resolve the issue presented, since the Circuits are split on the application of Chevron as well.

Respondent has invited the Court's attention to its brief opposing certiorari in Ghassan v. I.&N.S., cert. denied, 113 S.Ct. 1412 (1992), which also promised, in February 1993, that regulations would soon resolve this issue. In contesting certiorari, Respondent argued at length that Mr. Ghassan was unworthy of Section 1182(c) discretionary relief. The Solicitor General raises no such argument with respect to this petitioner. His equities the Board itself recognized. His eligibility to be considered for relief would be clear under the law of the First, Second, Seventh and Ninth Circuits. Unless granted relief he will be deported and excluded for life, depriving an American family of their husband, father, and breadwinner.

WHEREFORE, Petitioner requests that certiorari be granted.

Respectfully submitted,

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December 22, 1993